U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 23-0308 BLA

DAVID E. NEWCOMB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
REDHAWK MINING, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 05/28/2024
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Denying Benefits (2020-BLA-05265) rendered on a claim filed on April 2, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found the record does not contain any evidence of complicated pneumoconiosis, and thus Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. He found Claimant established thirty-five years of coal mine employment based on the parties' stipulation but did not establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b).[2] Thus, he found Claimant did not establish entitlement under 20 C.F.R. Part 718 and denied benefits.

On appeal, Claimant argues the ALJ erred in finding he is not totally disabled. Employer and its Carrier (Employer) respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in

[1] Claimant filed two prior claims but withdrew them. Director's Exhibits 1, 2. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Although Claimant established at least fifteen years of coal mine employment, the ALJ did not determine whether the employment was underground or performed in substantially similar conditions, as he found Claimant did not establish total disability. Decision and Order at 3, 7.

accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[4] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant did not establish total disability based on any category of evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 3-6. Claimant contends

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 13; Director's Exhibits 7-9.

[4] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

the ALJ erred in weighing the medical opinions at 20 C.F.R. §718.204(b)(2)(iv) and in finding he is not totally disabled.[5] Claimant's Brief at 5-8.

The ALJ considered the medical opinions of Drs. Green, Dahhan, and Fino. Decision and Order at 5-6; Director's Exhibit 15; Employer's Exhibits 5-9, 12. Dr. Green performed the Department of Labor sponsored complete pulmonary evaluation of Claimant and obtained a qualifying pulmonary function study and a non-qualifying blood gas study. Director's Exhibit 15. He diagnosed a moderate to severe restriction based on reductions in Claimant's FEV1, FVC, and MVV values on the pulmonary function study when compared to predicted values, and opined Claimant does not have the pulmonary capacity to continue his previous coal mine employment. *Id.* at 3-4. Drs. Dahhan and Fino examined Claimant and opined he is not totally disabled from continuing his usual coal mine employment and has no pulmonary or respiratory impairment based on their review of the objective testing.[6] Employer's Exhibits 5-9, 12.

The ALJ found all of the medical opinions were well-reasoned but gave less weight to Dr. Green's opinion because he did not review the August 20, 2019 and August 26, 2019 non-qualifying pulmonary function studies which were conducted after his examination. Decision and Order at 6. The ALJ stated "[i]t is unclear whether [consideration of these two studies] would have changed [Dr. Green's] position." *Id.* Thus, the ALJ found Claimant failed to establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. *Id.* at 5-6.

Claimant contends the ALJ erred in comparing qualifying versus non-qualifying test results to the physician's opinions in determining their credibility and did not properly address whether he nevertheless has a respiratory impairment that would preclude the performance of his usual coal mine work. Claimant maintains the ALJ's summary analysis

[5] We affirm, as unchallenged on appeal, the ALJ's findings that the pulmonary function studies and arterial blood gas studies do not support a finding of total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-5.

[6] In his initial report, Dr. Fino opined Claimant is totally disabled based on the reductions in the FEV1 and FVC values on pulmonary function testing that he observed. Employer's Exhibit 5 at 9. After reviewing Dr. Dahhan's report and objective testing, Dr. Fino concluded the study he conducted showed "poor effort" in comparison to the study Dr. Dahhan conducted and opined Claimant is not totally disabled. Employer's Exhibits 6-8.

fails to satisfy the Administrative Procedure Act (APA).[7] Claimant's Brief at 5-8; *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We agree, in part.

Total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing, as a non-qualifying impairment may still render a miner incapable of performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). In determining whether a miner is totally disabled, the ALJ must compare the exertional requirements of a miner's usual coal mine work with the physician's description of the miner's pulmonary impairment and physical limitations. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); Claimant's Brief at 5-8. Here, the ALJ failed to make a finding regarding Claimant's usual coal mine work or the exertional requirements of such work and failed to compare those requirements with the physicians' assessments of Claimant's pulmonary or respiratory condition to determine whether the opinions support a finding of total respiratory disability. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 578; *Ward*, 93 F.3d at 218-19; *Eagle*, 943 F.2d at 512 n.4; *see also McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably conclude that a miner is unable to do his last coal mine job); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability); Decision and Order at 3-6. The ALJ also did not adequately explain why Dr. Green's opinion was undermined by subsequent non-qualifying pulmonary function tests. *See Wojtowicz*, 12 BLR at 1-165; *see also Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 7-11 (Nov. 17, 2023); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14 (June 23, 2023).[8]

[7] The APA provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[8] Our dissenting colleague asserts that the ALJ permissibly gave less weight to Dr. Green's opinion because it was not based on a complete picture of Claimant's condition, as Dr. Green had not considered subsequent non-qualifying pulmonary function studies indicating that Claimant's respiratory condition was "better" than the earlier testing results

Because the ALJ failed to conduct the proper analysis at 20 C.F.R. §718.204(b)(2)(iv) and explain his findings as the APA requires, we vacate his determination that Claimant did not establish total disability based on the medical opinion evidence. *See Wojtowicz,* 12 BLR at 1-165; Decision and Order at 5-6; Director's Exhibit 15. Thus, we vacate the ALJ's findings that Claimant is not totally disabled and is unable to invoke the Section 411(c)(4) presumption, and the denial of benefits.

Remand Instructions

On remand, the ALJ must determine the exertional requirements of Claimant's usual coal mine employment and then reevaluate whether the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Cornett,* 227 F.3d at 578; *Eagle,* 943 F.2d at 512-13 (physician who asserts a claimant is capable of performing

---

he had considered. But the relevant issue is not whether the Claimant's subsequent objective studies provided better or non-qualifying results, but whether they nonetheless indicate that Claimant has an impairment that renders him incapable of performing his usual coal mine work, as even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment. *See Cornett*, 227 F.3d at 578. But the ALJ failed to make a finding regarding the exertional requirements of Claimant's usual coal mine work and compare those requirements with the physicians' assessments of Claimant's pulmonary or respiratory condition to determine whether the medical opinions might still support a finding of total respiratory disability. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 578; *Ward*, 93 F.3d at 218-19; *Eagle*, 943 F.2d at 512 n.4. In addition, the ALJ erred to the extent that he apparently credited the non-qualifying results of the subsequent pulmonary function studies merely based on their recency, as opposed to considering whether the results nevertheless might indicate Claimant has an impairment that renders him incapable of performing his usual coal mine work, as it is irrational to credit evidence solely on the basis of recency where it suggests the miner's condition is better or has improved. *Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Kincaid*, BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 7-11; *Smith*, BRB No. 21-0329 BLA, slip op. at 14.

Moreover, an ALJ is not required to discredit a physician, such as Dr. Green, who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner, objective test results, and exposure histories. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). To constitute a "reasoned" medical opinion, a physician need only base his diagnosis on "medically acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. §718.204(b)(2)(iv).

assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment). In rendering his credibility findings, the ALJ must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983). The ALJ should resolve conflicts in the medical opinions regarding the degree of Claimant's respiratory impairment[9] and consider whether there is sufficient evidence of record from which to conclude he is totally disabled.

If Claimant establishes total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must further determine whether Claimant is totally disabled upon consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Shedlock*, 9 BLR at 1-198. If Claimant fails to establish total disability, the ALJ may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

However, if Claimant establishes total disability, the ALJ must determine whether he has at least fifteen years of underground or substantially similar coal mine employment to invoke the Section 411(c)(4) presumption. If Claimant invokes the presumption, the ALJ must determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1). If Claimant establishes total disability but does not have fifteen years of qualifying coal mine employment, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. In rendering all of his credibility determinations and findings on remand, the ALJ must comply with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

[9] Claimant contends Dr. Dahhan's opinion that he has normal respiratory function is not credible in view of Dr. Dahhan's pulmonary function test that showed he had an "FEV1 that was 65-66% of predicted." Claimant's Brief at 4; Claimant's Post-Hearing Brief at 5-6. Further, Claimant contends that neither Dr. Dahhan nor Dr. Fino explained why he could perform his usual coal mine work when considering his FEV1 values. Claimant's Brief at 4; Claimant's Post-Hearing Brief at 5-6.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits, and we remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the ALJ's determination that Claimant did not establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and to vacate the denial of benefits. Consequently, I would affirm the ALJ's finding that Claimant did not establish total disability as it is consistent with law and supported by substantial evidence. *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The ALJ correctly noted that Dr. Green relied exclusively on the May 13, 2019 qualifying pulmonary function testing results he obtained to opine Claimant is totally disabled and did not have the opportunity to review the subsequent non-qualifying pulmonary function studies obtained on August 20, 2019 and August 26, 2019. Decision and Order at 5-6; Director's Exhibit 15 at 3-4. The later testing showed results indicating that Claimant's respiratory condition was better than the testing results Dr. Green considered. Employer's Exhibits 5, 6. Indeed, the August 26, 2019 testing results caused Dr. Fino to change his opinion from finding Claimant disabled to finding that he was not. Employer's Exhibits 5-8. Accordingly, when the ALJ considered Dr. Green's opinion he found that it was reasoned when evaluated based on the objective testing evidence Dr. Green reviewed. Decision and Order at 6. However, he questioned whether Dr. Green would have given the same opinion if he had reviewed the full record, particularly the subsequent testing. *Id.* In essence, he questioned the credibility of Dr. Green's opinion

because it was not based on a complete picture of Claimant's condition. Based on this, he permissibly gave Dr. Green's opinion less weight. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986) (medical opinion may be rejected if a physician does not have a complete picture of the miner's health); Decision and Order at 5-6; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (ALJ's "duty of explanation" is satisfied if "a reviewing court can discern what the ALJ did and why he did it"). Neither Dr. Fino nor Dr. Dahhan found Claimant to be totally disabled. Employer's Exhibits 5-9, 12. Thus, the ALJ found the preponderance of the medical opinion evidence does not support finding total disability. Decision and Order at 5-6.

It is not the function of this Board to reweigh the evidence for the ALJ. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The ALJ's finding that Claimant did not establish total disability based on Dr. Green's opinion because it was not founded on the full record was well within his discretion. *Shepherd v. Incoal, Inc*., 915 F.3d 392, 398 (6th Cir. 2019); *Elkins v. Sec'y of HHS*, 658 F.2d 437, 439 (6th Cir. 1981) ("If the [ALJ's] findings are supported by substantial evidence then we must affirm the [ALJ's] decision even though as triers of fact we might have arrived at a different result."). The ALJ sufficiently explained the bases for his determinations at 20 C.F.R. §718.204(b)(2)(iv) in accordance with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Thus, I would affirm the ALJ's rejection of Dr. Green's opinion that Claimant is totally disabled, the only opinion supportive of Claimant's burden of proof, and therefore affirm the ALJ's conclusion that the medical opinion evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). No question has been raised as to the ALJ's weighing of the other evidence, all of which he found does not support finding total disability. Decision and Order at 3-6. Consequently, I would affirm the ALJ's determination that Claimant failed to establish that he is totally disabled under the Act and the denial of entitlement to benefits.

JUDITH S. BOGGS
Administrative Appeals Judge